No: 10-156

In The

Supreme Court of the United States

Gene Scroggy, Warden

Petitioner

vs.

Eugene Gall

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT EUGENGE GALL'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Timothy G. Arnold*
Department of Public Advocacy
100 Fair Oaks Lane, Suite 302
Frankfort, KY 40601
(502) 564-8006
(502) 564-7890 (fax)
Tim.Arnold@ky.gov

Jeffrey E. Sherr
Assistant Public Advocate
100 Fair Oaks Lane, Suite 302
Frankfort, KY 40601
(502) 564-8006
(502) 564-7890 (fax)
Jeff.Sherr@ky.gov

Counsel for Respondent

*Counsel of Record

QUESTIONS PRESENTED

1978, after a trial that "overwhelmed the strictures of the constitution", Eugene Gall was convicted of the rape and murder of a 12-year old girl. In 1987, before the adoption of the AEDPA, Eugene Gall filed a petition for writ of habeas corpus challenging that judgment. In 2000, the Sixth Circuit granted the writ, finding that the Commonwealth had not sustained its burden of proof and committed other errors which warranted setting aside the conviction and sentence. When the writ became final, Gall filed a motion in the state court seeking to vacate his conviction. The state court denied Gall's motion, and its order was affirmed on appeal. A month after the state court case became final, Gall filed a motion to enforce the writ in the district court, seeking an order directing the Commonwealth to nullify his conviction. The district court granted the motion and ordered the Commonwealth to nullify Gall's conviction and expunge his record. The district court's ruling was affirmed on appeal. The Commonwealth has now filed this writ to consider the following questions:

"I.(a) Whether [in a non-AEDPA case] comity allows a federal habeas court the authority to nullify a state court conviction – which is akin to vacation – pursuant to the AEDPA and prior precedent from this court?

(b) When a habeas petition is granted, do collateral consequences render the expungement of the underlying conviction automatic?"

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RESPONDENT EUGENE GALL'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Eugene Gall respectfully requests that this Court deny the petition for a writ of certiorari which was filed by the Warden on behalf of the Commonwealth of Kentucky.[1]

OPINION BELOW AND JURISDICTION

Gall disputes neither the Commonwealth's description of the opinion below, nor its basis for this Court's exercise of jurisdiction.

[1] For clarity purposes, the Petitioner in this case will be referred to as the Commonwealth.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2243: " . . . The Court shall . . . dispose of [a writ of habeas corpus] as law and justice require."

STATEMENT OF THE CASE

Gall does not agree with Commonwealth's statement of the case[2] and offers the following as its counterstatement:

In 2000[3], the United States Court of Appeals for the Sixth Circuit found that "the overwhelming and undisputed evidence . . . was that [Eugene] Gall was not sane at the time he committed the acts in question."[4] In light of the "overwhelming" evidence of Gall's insanity, this Court concluded that the Commonwealth had not met its burden under Kentucky law of proving the absence of an extreme emotional disturbance.[5] Based on this and other significant constitutional errors[6], this Court concluded that . . .

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[2] For example, the Commonwealth states in the statement of the case that "Because of double jeopardy, under the Sixth Circuit's rationale, Gall could not be retried." However, in its brief before the Sixth Circuit, the Commonwealth stated that "Gall could have been retried for manslaughter, however, because he had already served the twenty (20) year available sentence, a retrial would have been pointless." Brief for Appellant/Respondent (Commonwealth of Kentucky), Sixth Circuit Case No 08-6554, CM/ECF Doc. No. 00615588857, at 33-34.

[3] The Petition was filed in 1987 and decided using pre-AEDPA habeas law. While the Question Presented makes reference to AEDPA, that statute has had no application to this case, and the text of the petition does not make reference to it at any time.

[4] *Gall v. Parker*, 231 F.3d 265, 278 (6th Cir. 2000). This case arose out of the 1978 conviction and death sentence imposed by the Boone (Ky.) Circuit Court for the rape and murder of Lisa Jansen. *Id.*, at 278. Prior to seeking relief on habeas corpus, Gall had sought relief from the Kentucky state courts, who denied both his appeal and his application for post-conviction relief. *Gall v. Commonwealth*, 607 S.W.2d 97 (Ky. 1980); *Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985). His application for a writ of habeas corpus had been denied by the Eastern District of Kentucky. *Gall v. Parker*, 231 F.3d at 278.

[5] *Id.* at 290.

[6] *Id.* at 312 (prosecutorial misconduct at trial); *Id.* at 326 (penalty phase instructions defective); *Id.* at 332 (erroneous exclusion of juror); *Id* at 334 (error during juror deliberations as to penalty).

> . . . the cumbersome circumstances of this trial and the Commonwealth's zeal in securing a murder conviction and death sentence overwhelmed the strictures of the Constitution. By failing to bind the Commonwealth to constitutional requirements and by allowing constitutional error to infect the trial in ways that altered its outcome, the trial and appellate courts failed in their duty to "administer justice . . . according to the laws and constitution of the United States."[7]

In light of the "overwhelming showing of Gall's severe mental illness and his high potential for future dangerousness" the Sixth Circuit granted habeas relief conditioned "on the state's granting him an involuntary hospitalization proceeding, just has he would have been provided if he had been found insane under Ky.Rev.Stat. 504.030."[8]

On remand, the district court entered a conditional order directing Gall to be released within 90 days, but authorizing the Commonwealth to retain him an additional 30 days if they initiated civil commitment proceedings. The order did not direct the Commonwealth to nullify or expunge Gall's conviction. Gall appealed from that judgment, challenging the district court's failure to require the Commonwealth to offer Gall an involuntary commitment proceeding.[9] The Commonwealth moved to dismiss that appeal because the issue was moot in light of Gall's release to Ohio.[10] The Sixth Circuit denied that motion finding "that collateral consequences still exist,

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[7] *Id.* at 336-37

[8] *Id.* at 336. Contrary to the suggestion of the Commonwealth in this Petition, nothing in the opinion prohibited Gall from being retried on the lesser offense of manslaughter. The Commonwealth simply chose not to pursue that option.

[9] *Gall v. Scroggy*, 69 Fed.Appx. 251 (6th Cir. 2003).

[10] *Id.* at 253.

and that a case or controversy exists with respect to whether this court's earlier opinion and judgment were fulfilled."[11] This Court went on to conclude that this Court's original opinion did not require Kentucky to involuntarily hospitalize Gall.

After his appeal was denied, Gall filed a motion in the state trial court under Ky.R.Civ.Pro. 60.02(e), seeking to have his conviction and sentence of death vacated pursuant to the Sixth Circuit's ruling in *Gall v. Parker*. The Commonwealth responded by arguing pursuant to *Fay v. Noia*[12] that the federal court did not have the authority to order the alteration of a state court judgment.[13] The state court agreed, and denied Gall's motion in a summary order.[14]

Gall appealed from that judgment. Echoing the arguments of the Commonwealth, the Kentucky Court of Appeals affirmed the ruling of the trial court, and took note of the "broader issues of justice at play here", finding that it was necessary to preserve the judgment because "[i]f our state court vacates Gall's conviction for murder he would in effect be relieved of all collateral consequences, including those he would have suffered under a

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[11] *Id.*

[12] *Fay v. Noia*, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed. 2d 837 (1963); *overruled by Wainwright v. Sykes*, 433 U.S. 72, 85 (1977) and *Coleman v. Thompson*, 501 U.S. 722 (1991)

[13] *Gall v. Commonwealth*, 2007 WL 1575303 (Ky.App., 3/12/08), R. 185, Exhibit B, pg. 2.

[14] 8/23/05 Order of the Boone (Ky.) Circuit Court, R. 185, Exhibit A.

manslaughter conviction . . .."[15] Gall sought review of the Kentucky Supreme Court decision, who denied the request in a summary order.[16]

Roughly 30 days after the Gall's application for relief was finally denied in the Kentucky Courts, Gall filed a "Motion to Enforce" in the Eastern District of Kentucky.[17] The Commonwealth responded by arguing among other things that Gall was not entitled to relief on the merits because of the "broader issues of justice" at play.[18] The matter was referred to a Magistrate Judge, who recommended that the motion be granted, and that the Commonwealth be ordered to nullify Gall's conviction.[19]

In its report, the Magistrate noted its "chagrin" at the effort the Commonwealth was expending in this matter, stating that:

> . . . this court cannot help but express some chagrin at the enormity of resources marshaled by the Commonwealth in opposition to petitioner's ongoing quest to have his unconstitutional conviction declared to be void. If no collateral consequences exist, and/or that any such consequences are redundant given the existence of other valid convictions, there would be little reason to continue the fight against the relief sought herein.[20]

In its objections to this report, the Commonwealth made itself clear that it was not that the collateral consequences did not exist, but that the

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[15] *Id.*. In reaching this conclusion, the Kentucky Court of Appeals apparently mistakenly interpreted this Court's opinion to find that Gall would have certainly been convicted of manslaughter based on the evidence presented at his trial. *Id.*

[16] May 12, 2008 Order of the Kentucky Supreme Court, R. 185, Exhibit C.

[17] R. 185.

[18] R. 194.

[19] R. 196.

[20] R. 196, pg. 17, n. 8.

Commonwealth regarded those consequences as appropriate in light of Mr. Gall's offense. As the Commonwealth stated:

> [The Commonwealth] has continued to oppose Gall because of a belief that this action was more than about enforcing the rule of law or concern over Gall's future right to vote or drive a car. As was confirmed by Gall in his Reply, this is about Gall wanting to get out of prison when he comes up for parole – a [sic] unfathomable prospect that was acknowledged by the Sixth Circuit when habeas relief was granted. Therefore, by continuing these efforts, the [Commonwealth] has attempted to ensure that Gall's horrible crimes against Lisa Jansen will not go unnoticed when the Ohio Parole Board assesses whether Gall should be paroled from his Ohio Prison. . . . [The Commonwealth's] efforts are part of an ongoing duty to protect society from Gall. It is because of unfortunate errors in the legal process that Gall's convictions related to crimes against Lisa Jansen were overturned. Nevertheless, when assessing his future dangerousness/risk to the public, the existence of this case should remain a factor to be utilized in determining whether he is entitled to be released. This Court has the discretion to determine what justice requires, and in this instance, Gall's release was sufficient. Justice does not require Gall to be fully relieved of all matters attended to his conduct when he raped and murdered Lisa Jansen.[21]

Ultimately, the District Court agreed with the Magistrate Judge and ordered nullification.[22] In reaching this conclusion, the District Court noted that the Commonwealth's argument that the matter was moot due to the absence of collateral consequences was "simply illogical", because "the [Commonwealth] acknowledges that collateral consequences exist, *and*

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[21] Commonwealth's Objections to Report and Recommendations, R. 199, pp. 18-19.
[22] R. 203.

expressly advocates that these collateral consequences should have a negative effect on Gall in the future."[23] The District Court concluded that in granting habeas corpus and ordering Gall's release from custody it had implicitly required that the Commonwealth also nullify Gall's conviction. As that relief had not been fully implemented, and as the Commonwealth clearly was deliberately attempting to impose collateral consequences on Gall based on an unconstitutionally obtained conviction, Gall was entitled to the relief he requested.[24]

The Commonwealth appealed from that judgment. In the Sixth Circuit, the Commonwealth did not raise the *Fay v. Noia* claim which is the principal issue it asserts in the instant petition. Rather, it asserted a number of procedural defaults which are not included within the questions presented and once again argued that "broader issues of justice" required the Court to deny relief, stating its belief that ". . . outside the structure of the institutional environment, Gall would reoffend. This Court's relief was designed with the clear intent of preventing Gall from getting such an opportunity. Gall is now hoping to use this Court's opinion, the same opinion that sought to keep him permanently institutionalized, as a tool to facilitate his release. Justice does not call for such a result."[25]

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[23] Opinion and Order, R. 203, pg. 10.
[24] *Id.*
[25] Brief for Appellant/Respondent, Sixth Circuit Case No 08-6554, CM/ECF Doc. No. 00615588857, pg. 34.

The Sixth Circuit Court of Appeals rejected the Commonwealth's arguments and affirmed, finding that:

> The Commonwealth convicted Gall of murder in violation of the Constitution, and our system does not recognize the concept of a conviction being only a little bit unconstitutional. It either is or is not; there is no middle ground from which the state may continue in a Kafka-esque manner to hold certain aspects of the conviction over the petitioner's head. Instead, the necessary and unescapable result of finding a conviction unconstitutional is that the conviction must be expunged and certainly may not be used in any manner that would be adverse or prejudicial to the petitioner. Although the Commonwealth is free to continue to disagree with our decision in 2000, the decision is final and binding and the Commonwealth has no authority to disregard it.[26]

The Commonwealth has filed the instant petition seeking review of that opinion.

REASON FOR DENYING THE WRIT

THE COMMONWEALTH'S PETITION IS BASED ON AN UNPRESERVED AND MERITLESS CLAIM, AND SHOULD BE DENIED

At least based on the cases which have resulted in published decisions, it appears that the Commonwealth of Kentucky is the only jurisdiction in the country which continues to assert the right to prospectively impose the collateral consequences of a criminal conviction in the face of a final federal court order finding that the conviction was obtained in violation of federal law. It is now seeking certiorari in this case in the hopes that this Court will endorse that practice. This Court should decline that invitation for a number

of reasons, including (a) the claim now presented to this Court for review was never presented to the lower court, and so the matter is unpreserved, (b) *Fay* does not conflict with *Carafas*, and (c) the case has been correctly decided, and does not present a substantial question for this Court to review.

A. The Claim Was Not Raised Below

The Commonwealth's principal argument in this Petition is that there is a conflict between *Carafas v. Levallee*[27] and *Fay v. Noia*,[28] which requires resolution by this Court. However, the Commonwealth did not cite to *Fay*, much less argue the principal which *Fay* assertedly supports, in the proceedings before the Sixth Circuit. As such, in deciding this case the Sixth Circuit never had an opportunity to pass on this issue, and therefore it not properly preserved for review by this Court. This Court has held that "ordinarily, this Court does not decide questions not raised or involved in the lower court."[29] Thus, certiorari should be denied in this case.

B. The Claim is Without Merit: There is No Conflict Between *Fay v. Noia* and *Carafas v. Levallee*

In *Fay v. Noia*, this Court considered the "narrow question" of:

> Whether . . . Noia may be granted federal habeas corpus relief from imprisonment under a . . . conviction now admitted by the State to rest upon a confession obtained from him in violation of the Fourteenth Amendment, after he was denied state post-conviction relief because the coerced confession

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[26] *Gall v. Scroggy*, 603 F.3d at 358-59.

[27] *Carafas v. Levallee*, 391 U.S. 234 (1968)

[28] *Fay v. Noia*, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed. 2d 837 (1963); *overruled by Wainwright v. Sykes*, 433 U.S. 72, 85 (1977) and *Coleman v. Thompson*, 501 U.S. 722 (1991).

[29] *Youakim v. Miller*, 425 U.S. 231, 234 (1976); *see also Delta Airlines v. August*, 450 U.S. 346, 362 (1981)("question presented in petition but not raised in court of appeals is not properly before us.")

> claim had been decided against him at the trial and Noia had allowed the time for direct appeal to lapse without seeking review by a state appellate court.[30]

Though the question presented was a narrow question of exhaustion, the opinion was very broad indeed, touching on a variety of issues related to the role of the federal courts in the American system of justice.

Within the context of a discussion of whether failure to comply with a state procedural bar was an "adequate and independent state law ground," this Court held that the cases which limited the court's review on that ground only related to the court hearing a case on direct appeal. This Court distinguished habeas corpus from direct appeal by holding that a direct appeal was concerned with the judgment, whereas the only issue in a habeas corpus action was "detention simpliciter."[31] So, whereas an appeal lies to correct the judgment, "Habeas lies to enforce the right of personal liberty; when that right is denied and the person confined, the federal court has the power to release him. Indeed, it has no other power; it cannot revise the state court judgment; it can act only on the body of the petitioner."[32] Accordingly, it held that federal habeas corpus relief was to be denied a state prisoner only if the state could show that the prisoner "deliberately bypassed" a state procedural requirement.[33]

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[30] *Id.* at 395.
[31] *Id.* 372 U.S. 430.
[32] *Id.* 372 U.S. at 430-431.
[33] *Id.* 372 U.S. at 438.

The language employed by the court was *dictum*, in that the ultimate decision did not rest on the passage quoted above.[34] Moreover, the policy endorsed by the Court in *Fay* was in favor of much broader review. As the Court stated "conventional notions of finality in criminal litigation cannot be permitted to defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review."[35] However, the *Fay* decision accurately described the limitations on habeas corpus relief that existed ***at the time***. For most of its history, the remedy available to the petitioner seeking a writ of habeas corpus was limited to discharge from custody. On numerous occasions, most recently *Parker v. Ellis*, this Court dismissed otherwise meritorious petitions for relief because the petitioner served out their sentence before the case could be decided.[36] In *Parker*, a four vote minority loudly objected to the continuing application of the rule. In this opinion, Chief Justice Warren, writing for the minority, noted that the mootness doctrine which the majority had applied to Parker no longer applied in habeas corpus motions for federal prisoners under 28 U.S.C.A. § 2255.[37] Noting that the habeas corpus statute provides the court the power to dispose of the case as "law and justice require", 28 U.S.C.A. § 2243, Warren concluded that "'law and justice require' that the patent invalidity of Parker's conviction

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[34] *See Wainwright v. Sykes*, 433 U.S. 72, 85 (1977)(characterizing as dictum).
[35] *Fay* at 424.
[36] *Parker v. Ellis*, 362 U.S. 574 (1960)
[37] *Parker, supra*, at 586.

be proclaimed." [38] Chief Justice Warren's strong dissent notwithstanding, the state of the law when *Fay v. Noia* was argued in 1963 was that habeas corpus only lay to correct matters of custody.

In *Carafas v. LaVallee* the court unanimously overruled *Parker v. Ellis*, and adopted the reasoning of Chief Justice Warren's dissent.[39] The court began by noting that

> It is clear that petitioner's cause is not moot. In consequence of his conviction, he cannot engage in certain businesses; he cannot serve as an official of a labor union for a specified period of time; he cannot vote in any election held in New York State; he cannot serve as a juror. Because of these disabilities or burdens which may flow from petitioner's conviction, he has a substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him. . . . On account of these collateral consequences, the case is not moot.[40]

Addressing the finding in *Parker* that a habeas corpus action conferred no authority to alleviate these collateral consequences, this Court held that "the [habeas corpus] statute does not limit the relief that may be granted to discharge of the applicant from physical custody. Its mandate is broad with respect to the relief that may be granted. It provides that 'the court shall dispose of the matter as law and justice require.' 28 U.S.C.A. § 2243."[41] Accordingly, *Parker* was overruled.

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[38] *Parker, supra* at 583 (Warren, C.J., dissenting).
[39] *Carafas v. LaVallee*, 391 U.S. 234 (1968),
[40] *Carafas, supra*, 391 U.S. at 237-238 (internal citations and quotations omitted).
[41] *Id.* 391 U.S. at 239.

Several days later, in *Sibron v. New York*, this Court elaborated on the its holding in *Carafas*.[42] In *Sibron* (which was a direct appeal) the court relied upon Chief Justice Warren's dissent in *Parker v. Ellis* to support its conclusion that "the obvious fact of life [is] that most criminal convictions do in fact entail adverse collateral legal consequences" such that "[t]he mere possibility that this will be the case is enough to preserve a criminal case from ending ignominiously in the limbo of mootness."[43]

Since that time, this Court has presumed that a petitioner in a habeas corpus action challenging the underlying criminal conviction (rather than merely the sentence imposed) suffers collateral consequences which are sufficient to prevent application of the mootness doctrine. For example, in *Evitts v. Lucey*,[44] the Commonwealth released the petitioner in a habeas corpus action from custody, and restored his civil rights five days before this Court heard oral argument. Nevertheless, citing *Sibron* and *Carafas*, this Court held that the case was not moot because "respondent has not been pardoned, and some collateral consequences of his conviction remain, including the possibility that the conviction would be used to impeach testimony he might give in a future proceeding and the possibility that it would be used to subject him to persistent felony offender prosecution if he should go to trial on any other felony charges in the future."[45]

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[42] *Sibron v. New York*, 392 U.S. 40 (1968).
[43] *Sibron, supra*, 392 U.S. at 55 (internal citations and quotations omitted).
[44] *Evitts v. Lucey*, 469 U.S. 387 (1985).
[45] *Evitts, supra*, 469 U.S. at 391, n. 4.

Where collateral consequences exist, this Court has been clear that the federal court has the authority to remedy those consequences through "nullification" and "expungement." In *North Carolina v. Rice*, for example, a prisoner filed a habeas corpus petition challenging the sentence he received in a retrial, asserting that the enhanced sentence violated *North Carolina v. Pearce*.[46] This Court found if Rice were challenging his conviction and prevailed, that challenge "mandated expunction of Rice's conviction and because the conviction, unexpunged, would have collateral consequences entitling Rice to challenge it."[47] However, the Court determined that even if Rice's legal position were accepted, then only his sentence was invalid. As Rice was not challenging his conviction, this Court concluded the case might be moot. As this Court explained: "Nullification of a conviction may have important benefits for a defendant, as outlined above, but urging in a habeas corpus proceeding the correction of a sentence already served is another matter."[48] That opinion was reaffirmed several years later in *Lane v. Williams*.[49] Similarly, in *Spencer v. Kemna*, this Court noted that habeas corpus petitions that challenge a criminal conviction are not mooted by the prisoner's release, because the conviction itself "constitutes a concrete injury, caused by the conviction and redressable by invalidation of the conviction."[50]

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[46] *North Carolina v. Rice*, 404 U.S. 244 (1971); *North Carolina v. Pearce*, , 395 U.S. 711 (1969)
[47] *Rice*, 404 U.S. at 247
[48] *Id.*, at 248.
[49] *Lane v. Williams*, 455 U.S. 624, 631 (1982)
[50] *Spencer v. Kemna*, 523 U.S. 1, 7 (1998)

In short, the answer to the first question presented – is a federal court permitted to nullify and order expungement of a state court conviction obtained in violation of federal law – is "yes." In entering such an order the federal court is not tinkering in the affairs of a state government, merely affording the relief necessary to prevent the continuing violation of federal rights arising out of the unconstitutionally obtained conviction. This conclusion is in no way undermined by *dictum* in this Court's prior opinion in *Fay v. Noia*. First, contrary to the Commonwealth's characterization of *Fay* as "good law", *Fay* has now been overruled, and while it is occasionally cited for its historical analysis of habeas corpus law, it is no longer authoritative for any position.[51] Second, even though this Court has on occasion saw fit to cite *Fay v. Noia* in a case where the petitioner had served out their sentence or was not subject to physical custody, it has never observed the "conflict" which the Commonwealth now describes.[52] And finally, as explained above, the *dictum* in *Fay* which the Commonwealth is relying upon has since been

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[51] *See Wainwright v. Sykes*, 433 U.S. 72, 85 (1977); *Coleman v. Thompson*, 501 U.S. 722 (1991). Notably, none of the lower court cases relied upon by the Commonwealth on pp. 11-12 of the Petition for Certiorari even cite to *Carafas* (and many do not cite to *Fay*). The only case which specifically involved a defendant who was seeking to vacate their state court conviction resulted in a decision directing that the conviction be set aside. *Wanatee v. Ault*, 120 F.Supp.2d 784 (N.D.Iowa 2000). The Sixth Circuit opinions cited on pg. 12 do not involve an order purporting to nullify a constitutionally defective state court conviction. Notably, one of the opinions the Commonwealth relies on specifically states that "a district court's habeas jurisdiction expires after it has granted the writ ***and vacated the conviction***, and the State has released the petitioner." *Girts v. Yanai*, 600 F.3d 576, 590 (6th Cir.2010)(Batchelder, concurring)(emphasis added).

[52] *See Engle v. Isaac*, 456 U.S. 107 (1982); *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484 (1973); *Hensley v. Municipal Court*, 411 U.S. 345 (1973); *Sibron v. New York*, 392 U.S. 40 (1968).

superseded by subsequent, controlling opinions which clearly set forth the law in this area.

C. The Court Below Correctly Resolved the Issue Before It

The second question presented by the Commonwealth is whether granting a writ of habeas corpus (presumably challenging the validity of the conviction) rendered expungement "automatic." While the question itself is not clear, it appears from the argument that the Commonwealth would like this Court to determine (a) whether a federal court may permit a state to continue to prospectively assert the validity of an unconstitutionally obtained conviction for the purpose of ensuring that collateral consequences continue to flow from that conviction, and (b) whether the collateral consequences in this case were sufficient to warrant the exercise of federal jurisdiction. The first issue gets to the Commonwealth's argument about the "broader issues of justice," which according to the Commonwealth ought to authorize it to pretend that Mr. Gall's conviction is still valid. Such a suggestion is anathema to an orderly system of justice, and has never been even hinted at by any decision of this Court or any federal court. The law of this case is that the Commonwealth did not prove the charges beyond a reasonable doubt. It would be contrary to the presumption of innocence for the Commonwealth to be permitted to pretend that it proved those charges, merely because it is more expedient to do so.[53]

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[53] *See In re Winship*, 397 U.S. 358 (1970)

On the second question (jurisdiction), the Commonwealth was incorrect both on the law and on the facts. The charges for which Mr. Gall was wrongfully convicted undeniably carry collateral consequences. A Kentucky defendant convicted of Gall's offenses is not allowed to vote,[54] hold public office,[55] serve on a jury,[56] or carry a firearm,[57] to name but a few of the consequences that flow from a felony conviction. The Commonwealth objects to counting those collateral consequences, arguing that Gall is currently incarcerated on other charges and would receive many of the same consequences as a result of those convictions. However, in *Sibron v. New York*, this Court reviewed the issue of collateral consequences and saw ". . . no relevance in the fact that Sibron is a repeat offender", in part because "[w]e cannot foretell what opportunities might present themselves in the future for the removal of other convictions from an individual's record."[58] The Court's reasoning in *Sibron* is supported by its general concern that there be no possibility that the challenged conviction be used to adversely affect the inmate. The lower courts are fundamentally in agreement with that position, raising no significant split of authority.[59]

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[54] Ky. Const. § 145
[55] Ky.Const. § 150;
[56] Ky.Rev.St. 29A.080(2)(e);
[57] Ky.Rev.St. 527.040.
[58] *Sibron v. New York*, 392 U.S. 40, 56, 88 S.Ct. 1889, 1899 (1968)
[59] *Murray v. Wainwright*, 450 F.2d 465, 468 (5th Cir. 1971); *Harrison v. Indiana*, 597 F.2d 115, 118 (7th Cir. 1979); *Larche v. Simons*, 53 F.3d 1068, 1071 (9th Cir. 1995). The Magistrate Judge concluded that *Malloy v. Purvis* 681 F.2d 736, 739 (11th Cir. 1982) took a different position, because the Eleventh Circuit "interpret[ed] *Sibron* simply to mean that the state must show that *no possibilities exist* for the imposition of collateral legal consequences on the basis of the challenged conviction." The Magistrate Judge's characterization of *Mulloy* as

Regardless, in this case both the district court and the circuit court did not need to address that issue because, as the district court stated, "the [Commonwealth] acknowledges that collateral consequences exist, *and* expressly advocates that these collateral consequences should have a negative effect on Gall in the future."[60] Indeed, the Commonwealth has made no secret of the fact that its purpose is to ensure that there is a conviction "on the books" which will adversely affect Gall's parole chances and any other benefit he might seek to obtain. They do this based on their continuing assertion of his "obvious factual guilt" for the murder of Lisa Jansen.

The Commonwealth tried Mr. Gall for murder and failed to prove their case beyond a reasonable doubt. The Sixth Circuit's original opinion made clear that the "overwhelming" evidence of Gall's insanity would make conviction for any offense difficult to obtain. The Commonwealth should not be permitted to continue to assert that Gall has been validly convicted of this crime, when he clearly has not.

D. There Is No Important Federal Question to Review

Finally, this Petition does not present any of the grounds on which review is ordinarily granted. Supreme Court Rule 10 provides that generally this Court will not review the actions of a lower federal court unless the case involves a split of authority, the lower court's actions are such a great

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contrary authority was probably a bit generous, as that Circuit has not followed that authority since 1989, when it ruled that the Supreme Court's decision in *Evitts* required the state to prove that now completed conviction could not be used in a subsequent proceeding to enhance a sentence – essentially making it impossible for a state to meet its burden to show the absence of collateral consequences. *See Minor v. Dugger*, 864 F.2d 124 (11th Cir. 1989).

departure from the "accepted and usual course of judicial proceedings" as to warrant the exercise of this Court's supervisory powers, or the case relates to an unresolved federal question. None of those considerations apply here.

First, there is no split of authority. That is not because other jurisdictions are aligning with the Sixth Circuit's view of the issue, but because no other jurisdiction has been asked to make the ruling Kentucky sought in this case and in *Gentry*. It appears from a review of the cases known to the undersigned that in the post *Carafas* era, no other jurisdiction has taken the position asserted by the Commonwealth in this case. If there is a federal case which reaches a holding consistent with what the Commonwealth is seeking in this Petition – that a state may continue to impose collateral consequences for a conviction which was invalidated by a federal court – the Commonwealth has not mentioned it at any stage of the proceedings.

Second, the questions presented do not relate to the "accepted and usual course of judicial proceedings," or to any procedural issue. Even if they did, there is nothing about the procedure in this case which warrants this Court's attention. Gall sought and obtained a ruling granting his petition for habeas corpus. When the state court refused to act on that petition, he promptly sought to enforce his rights. The lower court found that that "this is not a case where petitioner sat on his hands."[61]

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[60] Opinion and Order, R. 203, pg. 10 (emphasis in original).
[61] *Id.*, pg. 13.

Finally, there is no important federal question presented by this case. As noted above, this issue appears to be litigated in only one jurisdiction – Kentucky. Outside of Kentucky, every other jurisdiction has apparently been able to accept that they cannot continue to implement collateral consequences for an unconstitutionally obtained conviction.

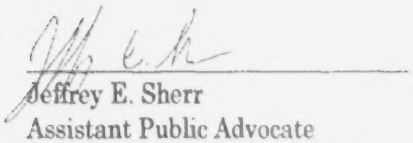
CONCLUSION

For the better part of a decade, the Commonwealth has been objecting to the Sixth Circuit's decision finding that it failed to prove Eugene Gall's guilt beyond a reasonable doubt, and that his trial "overwhelmed the strictures of the Constitution." Now, in what one hopes is the final act of resistance, it is asking this Court to take review of an issue they did not directly present to the Sixth Circuit, which would require undoing more than thirty years of settle precedent, and which does not relate to any broader national issue, all for the purpose of permitting it to disregard the order of the federal court. This Court should not prolong this litigation or give life to a legal theory which would significantly undermine the Great Writ. Therefore, for the foregoing reasons, Eugene Gall prays that this court deny the Commonwealth's petition for writ of certiorari.

Respectfully Submitted,

Timothy G. Arnold*
Department of Public Advocacy
100 Fair Oaks Lane, Suite 302
Frankfort, KY 40601
(502) 564-8006

(502) 564-7890 (fax)
Tim.Arnold@ky.gov
Counsel for Respondent



Jeffrey E. Sherr
Assistant Public Advocate
100 Fair Oaks Lane, Suite 302
Frankfort, KY 40601
(502) 564-8006
(502) 564-7890 (fax)
Jeff.Sherr@ky.gov

*Counsel of Record